ALBERTA'S SUBMISSION *to the* INTERNATIONAL JOINT COMMISSION

Requesting a Review of the IJC's 1921 Order on the Measurement and Apportionment of the St. Mary and Milk Rivers

Alberta

CONTENTS

1 **Executive Summary**

3 **1.0: Introduction**

3 **2.0: Historical Background and Discussion**
3 2.1: 1895-1909 Negotiations of Boundary Waters Treaty
4 2.2: 1915-1921 Hearings
4 2.3: The 1921 Order
6 2.4: 1927 to 1931: Montana Challenge to the 1921 Order

7 **3.0: Stability and Sustainability**
7 3.1: 1931 to 2003: 80 Years of Stability, Development and Cooperation

9 **4.0: Water Management in Alberta**
9 4.1: Infrastructure
9 4.2: Irrigation Development
10 4.3: The St. Mary Project

10 **5.0: Ensuring Sustainable Supply**
10 5.1: Rehabilitation and Increasing Efficiency

11 **6.0: Montana's 2003 Challenge to the 1921 Order**
11 6.1: Settled Issue Raised Again
24 6.2: Issues Raised At Public Meetings

29 **7.0: Alberta's Commitment to Continued Improvements in the Beneficial Use of Water**
29 7.1: Managing Demand
29 7.1.1: No More Allocations Allowed on the St. Mary or Milk Rivers
29 7.2: Emphasis on Conservation

30 **8.0: Economic Benefits**
30 8.1: Other Uses

30 **9.0: Working Relationships**
30 9.1: Between Canadian Provinces
31 9.2: Addressing Issues within the Framework of The Order

31 **10.0: Conclusions**
31 10.1: All of these points have previously been discussed, considered and ruled upon fairly
32 10.2: Certainty is needed for investment and economic growth
32 10.3: Issues have been – and can continue to be – worked out within the framework of the Order
32 10.4: Let's move forward and co-operate on future developments

EXECUTIVE SUMMARY

In 2003 the Governor of the State of Montana sent a letter to the American Section of the International Joint Commission (IJC) requesting that it review the 1921 Order respecting the measurement and apportionment of the St. Mary and Milk Rivers.

In January 2004, the Governor of the State of Montana, at the request of the IJC, provided to the Commission a letter and attachment setting out the reasons for Montana's request. Montana's letter essentially identifies four reasons for requesting a review of the 1921 Order. These are summarized below, followed by Alberta's response to each point:

1. Montana does not feel the Order satisfies the language in the first sentence of Article VI of the Boundary Waters Treaty.

   Alberta Position:
   The Order reflects the interpretation of the entire language of Article VI. This issue was extensively discussed during the course of the 1915-1921 hearings and the 1921 Order of the IJC was based on full understanding and consideration of all factors associated with this issue, including a review of **all** records from the 1915-1921 hearings used in the reconstruction of the Treaty's intent. Montana's stated rationale does not contain anything that was not previously considered by the IJC and does not justify a review of the 1921 Order.

2. Today's reality is significantly different than that foreseen in 1920 and the Order should reflect this reality.

   Alberta Position:
   Today's reality in fact is no different than conditions that existed in either 1909, at the signing of the Treaty, or the period prior to the 1921 Order.

   The quantity, variability, and seasonality of flows in the Milk and St. Mary River are nearly identical to that which existed in 1921.

   The infrastructure required to permit each country to capture and utilize their share of the waters of the St. Mary and Milk Rivers is not appreciably different than what was known in 1915.

   What is different is that based on the security of supplies identified by the 1921 Order, Alberta has invested in the infrastructure required to take and utilize its share of the waters of the St. Mary and Milk Rivers as defined by the 1921 Order. This has resulted in a highly efficient water distribution system and irrigation methods. These investments and water management strategies have provided Alberta the opportunity to take, store and effectively utilize its entitlements, as defined by the 1921 Order. Any review of the 1921 Order would introduce uncertainties as to reliable water supplies and act as a disincentive to investment in the region.

3. There are problems with the administrative procedures that implement the Order.

Alberta Position:
In spite of minor computational problems, Montana has and continues to receive flow that is greater than its entitlement in the Milk River. Further, the Reclamation and Irrigation Officers of the two countries are taking "such further and other steps as may be necessary or advisable in order to insure the apportionment of the said waters in accordance with the directions of the 1921 Order" as evidenced by the Eastern Tributaries Working Group and the Milk River Working Group which have participation from Alberta, Saskatchewan and Montana and are working towards updating the apportionment computation procedure for the Eastern Tributaries and Milk River respectively. As such, Montana has not provided sufficient reason to open the 1921 Order for a review.

4. Proposed projects in both countries warrant a review of the 1921 Order.

Alberta Position:
The proposal in Montana for the rebuilding of the St. Mary Diversion Canal and the proposal in Alberta that a dam be constructed on the Milk River to store Alberta's share of the waters of the Milk River, simply reflect each country's desire to beneficially use the waters allocated to them. Just as Canada wishes to use the water allocated to it, the US and Montana are free to do the same. Neither action requires or warrants a review of the 1921 Order.

In July 2004, the IJC held public meetings in Havre and Malta, Montana, Eastend, Saskatchewan, and Lethbridge, Alberta, to gather information to assist it in making a decision whether to review the 1921 Order. Alberta attended all of the meetings and presented information on why the 1921 Order need not be reviewed and identified the positive impacts the 1921 Order has had on the economy and stability of current and future water management investments in the region.

This report provides more detailed information which demonstrates that:

- all of the issues raised by Montana were presented in detail, extensively debated and fully considered by the IJC prior to their issuing the 1921 Order;
- the Order fully meets the intent of Article VI of the 1909 Treaty; and,
- that it has been effective, fair to both countries, and has stood the test of time.

1.0: INTRODUCTION

In 2003 the Governor of the State of Montana sent a letter to the American Section of the International Joint Commission (IJC) requesting that it review the 1921 Order respecting the measurement and apportionment of the St. Mary and Milk Rivers. In January, 2004, the Governor of the State of Montana, at the request of the IJC, provided to the Commission a letter and attachment setting out the reasons for Montana requesting a review of the 1921 Order.

In July 2004, the IJC held public meetings in Havre and Malta, Montana, Eastend, Saskatchewan, and Lethbridge, Alberta, to gather information to assist it in making a decision whether to review the 1921 Order. Alberta attended all of the public meetings and presented information on why the 1921 Order need not be reviewed and identified the positive impacts the 1921 Order has had on the economy and stability of current and future water management investments in the region.

This report provides more detailed information in support of Alberta's position that the order should not reviewed as:

- all of the issues raised by Montana were presented in detail, extensively debated and fully considered by the IJC prior to their issuing the 1921 Order;
- the Order fully meets the intent of Article VI of the 1909 Treaty; and it has been effective, fair to both countries, and has stood the test of time;
- any review of the 1921 Order would introduce instability and uncertainty which would harm the positive impact the order has had on Alberta's economy and on the stability of current and future water management investments in the region.

2.0: HISTORICAL BACKGROUND AND DISCUSSION

2.1: 1895-1909 Negotiations of Boundary Waters Treaty

In 1895, at a meeting of the International Irrigation Congress in Albuquerque, New Mexico, a resolution was adopted suggesting a treaty between the United States, Mexico and Canada and the appointment of an international commission for the adjudication of differences that had arisen or might arise between the three countries in relation to international waters.

In 1909, after many years of negotiations, Canada and the United States signed the Boundary Waters Treaty that, among other things, provided the principles and mechanism for preventing and resolving disputes concerning water quantity and quality issues along the boundary between Canada and the United States. The Treaty also established an International Joint Commission (IJC), with three members from each country, to help resolve disputes. Included within the Treaty was Article VI, which outlines how the Montana, Alberta and Saskatchewan waters of the St. Mary and Milk Rivers (including the Battle Creek, Lodge Creek and Frenchman River, tributaries of the Milk River that originate in the Cypress Hills) are to be shared between Canada and the United States.

2.2: 1915-1921 Hearings

Following the signing of the Treaty, the two countries could not agree on the interpretation of Article VI. Therefore, before entering upon the discharge of its duty to measure and apportion the waters of the Milk and St. Mary Rivers, the IJC held a number of hearings across Canada and the U.S. for the purpose of:

"*...hearing the representatives of the United States and Canada, the State of Montana, the Provinces of Alberta and Saskatchewan, and any others on either or both sides of the boundary in respect to equal apportionment of these waters, the prior appropriation by the respective countries, their beneficial use, and any and all other questions involved in the interpretation of said article and said treaty, as affecting the rights and interests of all concerned in both countries.*"[1]

These meetings started in 1915 and continued for seven years to when the IJC issued its Order in 1921.

Starting with the first hearing, held on May 24-28, 1915 in St. Paul, it became apparent that the two governments and the citizens within each country, held strongly conflicting views as to the interpretation of Article VI. In total, 13 days of hearings were held at five locations in Canada and the United States. Proceedings are recorded in about 1000 pages of transcripts. Exhibits included numerous reports, briefing documents, letters, memoranda, tables and maps.

During the course of these hearings, the IJC allowed all possible issues and arguments to be advanced, competently and extensively debated, and thoroughly considered by the Commissioners prior to the IJC issuing the 1921 Order. In fact, in reviewing the 1915-21 hearings it is evident that, not only did the Commission permit all arguments to be fully presented, extensively debated and thoroughly considered, but that it also went to great lengths to ensure the final decision would reflect the intent of the Treaty by permitting the United States' request to reconstruct and debate the intent of the Treaty through a complete and exhaustive review of all correspondence, drafts, proposals and counter proposals relating to Article VI and leading up to the signing of the Treaty. This was of considerable advantage to the Commissioners, as they not only considered all the various arguments put forward by the two countries but also crafted an Order that, while not fully satisfactory to either country, reflected the clear intent of the Treaty negotiators respecting all aspects of Article VI.

The transcripts of the 1915 to 1921 hearings show emphatically that all of the issues and arguments raised in Montana's 2004 response to the International Joint Commission had been fully presented, extensively debated and thoroughly considered by the IJC prior to issuing its 1921 Order.

2.3: The 1921 Order

The rules established by the 1921 Order of the IJC for sharing the waters, as with article VI, are based on flow volumes and seasons. The Order established that apportionment was to be carried out at the International Boundary. It provided for practical prior appropriation to Canada from the St. Mary River, and to the United States from the Milk River, consistent with the negotiated condition within Article VI. Consistent with the negotiated conditions in Article VI, the Commission recognized the impracticality of forcing each country to wait until the other got its full appropriation, so it allowed each country 25 per cent of the water, even at low flows. This provision of the Treaty reflects a modification to the principal of Prior Appropriation, which is that a party is entitled to its entire share before the other party is entitled to any water. Based on the reconstruction, the Commissioners established that the intent of the Treaty was to set the prior appropriations as separate and distinct from the waters that were to be shared equally. The prior

[1] Page 4, 1915 Hearing, St. Paul, Minnesota

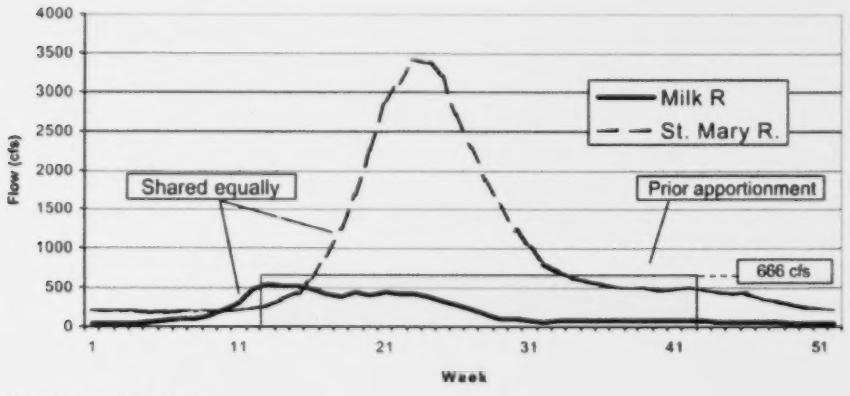
appropriations negotiated and included in Article VI of the Treaty, in part reflect water use by the two countries prior to the Treaty, in part Canada's demand to "*receive a compensation, in a quantity of water,*" for the use and damages resulting from the use of the channel of the Canadian Milk River to convey U.S. St. Mary diversions, and in part the U.S.'s intent to secure water for the "Government project" being considered at the time of the negotiations. The non-inclusion of prior appropriations in the equal sharing formula is consistent with the water allocation principle of "first in time, first in right" which was being applied in both the American and Canadian west at that time (see Section 6.2.3).

Consistent with the Treaty, the IJC Order allowed Canada, during the irrigation season, a prior appropriation of three-quarters of the flow of the St. Mary at the Boundary for flows up to 666 cubic feet per second (cfs). The U.S. received the same prior appropriation during the irrigation season from the Milk. All flows outside the irrigation season and above these prior appropriations were to be shared equally. As the St. Mary River has a flow greater than 666 cfs more often than the Milk, Canada's prior appropriation is less likely to fall short, a condition which was recognized both at the negotiations leading up to the signing of the Treaty and at the 1915-21 hearings. This is evident in the testimony of Mr. F.H. Newell, Consulting Engineer of the United States Reclamation Service, who was "designated on the part of the [United States] government to consider the preliminaries to drawing up what is now article 6 of the treaty":

"*At or before the beginning of the irrigation season St. Mary River usually rises rapidly to a discharge of from one thousand to several thousand second feet and falls more slowly during the latter part of the irrigation season....It was appreciated that little difficulty would result in assigning Canada a prior right to 500 cubic feet per second. In the case of the Milk River the conditions are quite different. Milk River rarely carries during any considerable period as much as 500 cubic feet per second of water across the Eastern Boundary.*"[2]

The following figure shows graphically how the rivers are shared under the Order. The rectangle represents the volume of water in which each country receives a moderately greater share than the other as part of the prior appropriations outlined in the Treaty. All volumes outside the rectangle are shared equally. Canada receives three-quarters of the volume of flow in the rectangle under the dotted line (St. Mary), while the U.S. receives three-quarters of the volume of flow in the rectangle under the solid line (Milk).

Figure 1 How the St. Mary and Milk Rivers are Shared



[2] Page 18, 1915 St. Paul Hearing

2.4: 1927 to 1931: Montana Challenge to the 1921 Order

In 1927, Montana, through the U.S. State Department, addressed the chairman of the American Section of the IJC requesting that the 1921 Order be re-opened for further consideration by the Commission.

W. L. Mackenzie King, Canadian Secretary of State for External Affairs, expressed Canada's objection to the re-opening by stating,
"*It is clear to the Canadian Government that if the settlement of any given issue reached under this system could be regarded as subject to being re-opened at any time at the simple request of either party, there could be no hope for finality or of certainty, and the integrity and usefulness of the whole system would be gravely endangered.*"

He goes on,
"*If the re-opening of such an award is ever justifiable at all, it would seem that such a course could be justified by nothing less than a new situation arising from new conditions, which were not in existence at the time of award, which could not reasonably have been contemplated at the time, and which are of a character to render the award a substantial denial of justice.*"[3]

At the 1928 Proceedings, Montana's eminent Senator and lawyer, the Hon. Thomas J Walsh believed that the issue of how the waters were to be divided, as presented in the Order, had not been raised or discussed at the 1915 to 1921 hearings leading up to the Order. Senator Walsh was of the same mind as Canada's Mackenzie King that once an issue had been thoroughly discussed there should be finality to the debate as evidenced by the following statement which he made at the 1928 Hearings in Washington D.C.

"*Again I say, that with respect to any matter that has been presented to the Commission, that has been debated, and discussed before the Commission, we have no right to come before the Commission and ask that it be reopened, or that any order that it makes with respect to the matter be reopened. It is in the interest of both countries that these questions should be settled...*"[4]

This same message was repeated at the 1931 hearing as evident by the following exchange between Senator Walsh and Mr. J.E. Reed the legal counsel for Canada:
Mr. Reed: *Because my position is that all of this material was before the Commission in 1921 when it made this order; all of these figures were then before it and the order was made in view of the figures, and they do not indicate any circumstances that have arisen since the order that would justify the Commission in reopening the question. I have no objection to Senator Walsh referring to that by way of an example of what will later happen. I intend to produce records based on hydrometric records and not inferences as to what did happen.*

Senator Walsh: *That will be all right. I merely pause to say that I am now leading up to the contention that the question which is now being presented to this Commission never has been presented to it. If it had been we would not be here at all. We would have no standing here at all.*[5]

The next day, after examining the transcripts of the St. Paul and other hearings, Senator Walsh, in a statement that demonstrated his great integrity, led the Commission through elements of previous transcripts where these issues had in fact been discussed. He then said the following:
"*Now, I feel as if an apology is due the Commission from me for having stated that the record was silent upon this subject*"

[3] Page 6, 1928 Proceedings, Washington, D.C.
[4] Page 15, 1928 Proceedings, Washington, D.C.
[5] Page 15, 1931 Proceedings, Washington D.C.

The outcome of this hearing was that the Order remained in place without the need for a review.

In their 2003-04 request and response to the IJC, Montana has raised the same issues that were raised in the 1927 challenge. While 73 years have passed since the exchange between Mr. J.E. Reed and Senator Walsh, those statements are still relevant today.

3.0: STABILITY AND SUSTAINABILITY

3.1: 1931 to 2003: 80 Years of Stability, Development and Cooperation

Based on the rules of the 1921 Order, Canada and the U.S. have successfully and co-operatively shared the waters of the Milk and St. Mary River for over 80 years. Accredited Officers and Field Officers from each country have diligently measured the flow in each river and twice each month (on the 15th and the end of each month) calculated each country's entitlements for the elapsed 15 or 16-day balancing period. In the event of a shortfall, Montana and Alberta are notified so they can remedy the situation in the subsequent 15-day computational period if possible. At the end of each year the Accredited Officers have signed off a report to the IJC confirming that the Order was implemented properly.

Because of the variability of river flows and the need for significant investment to capture, store and use water from each river, neither country has been able to take and use its entire share of the water. This situation has resulted in more water generally being passed downstream than is required. The quantity of this excess delivery has depended on the annual and seasonal variability of flows and on the infrastructure developed by the upstream jurisdiction to enable it use its entitlements.

On the Milk River, Canada has only developed the capacity to capture and use seven per cent of its entitlements. The rest flows unused to the U.S. As a result, the U.S. receives 147 per cent of its Milk River entitlements. On the other hand, the U.S. has not developed the infrastructure and storage capacity required to fully use its share of the St. Mary River. As a result, the U.S. uses only about 62 per cent of its entitlements of the St. Mary River with the rest flowing uncaptured into Canada, resulting in Canada receiving 128 per cent of its entitlements on the St. Mary.

The following table illustrates how each country receives excess flows, over and above entitled flows. This is primarily due to the inability of each country to capture and utilize excess flow during snowmelt runoff or flooding events.

Table 1

Summary of Entitlements and Flows Actually Received by Canada and U.S. in acre feet (1950-2002)
Note: Does not include winter flows for the Milk River and Eastern Tributaries which flow undiminished to the U.S.

	St. Mary River	Milk River	Lodge Creek	Battle Creek	Frenchman River	Total
Average U.S. entitlements (acre-feet)	268,388	77,853	12,336	12,989	32,705	404,272
Average flow taken/received by U.S. (acre-feet)	166,485	114,721	17,615	17,320	49,346	365,488
Entitlement as a per cent of total flow	40.97	66.38	50.00	50.00	50.00	45.50
Per cent of entitlement received/taken	62.03	147.36	142.80	133.34	150.88	90.41
Average Can. entitlements (acre-feet)	386,766	39,428	12,336	12,989	32,705	484,224
Average flow taken/received by Can. (acre-feet)	495,247	2,845	7,057	8,767	16,062	529,978
Entitlement as a per cent of total flow	59.03	33.62	50.00	50.00	50.00	54.50
Per cent of entitlement received/taken	128.05	7.22	57.21	67.49	49.11	109.45

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While apportionment is currently carried out on a daily basis, it is effectively carried out on a 15-day basis due to the computational procedures. A further lengthening of the balancing period, as proposed by Montana, could effectively lead to a situation in which Montana would receive all of its Milk River entitlement in the form of uncaptured waters (what the 1915-21 hearings referred to as "waste" water) which neither Canada nor Montana would be able to capture or use.

If credit were given for surplus flows that the upstream country cannot capture or use, it would impose a burden on the downstream country to capture these flows when made available, at the discretion of the upstream country, by building more storage. While Canada has built substantial storage to capture and use its share of the St. Mary River during most years, the U.S. has not developed appreciable storage within the St. Mary or Milk River basins. The result of using proposed apportionment procedures that credit excess deliveries would be to credit the upstream country for the delivery of flood water which the downstream country may not be able to use. In the case of the Milk River, under the proposed modification, Canada could build a credit against total U.S. entitlements by passing flood flows, such that once Canada has passed the flood flows it could proceed to take all of the flow of the Milk River, including water that U.S. farmers would normally receive during low flow periods. The current procedures are a fairer approach and provide a practical solution, especially for water use related to the agricultural growing season.

4.0: WATER MANAGEMENT IN ALBERTA

4.1: Infrastructure

Based upon the certainty provided by the 1921 Order, Albertans have made significant investments to store, convey and deliver water for farms, industry and power generation. This includes a system of diversion canals, storage reservoirs (both on-stream and off-stream) and irrigation canals.

4.2: Irrigation Development

Irrigation development in Alberta, predominantly located in southern Alberta's South Saskatchewan River Basin, exceeds 1.6 million acres and represents two-thirds of all irrigation development in Canada. About 1.3 million acres are located in 13 organized irrigation districts and some 300,000 acres are in private irrigation developments.[6]

The Southern Tributary Rivers (Waterton, Belly and St. Mary Rivers) provide the water needs of eight irrigation districts that serve a total of 565,809 acres, plus the 25,000-acre Blood Tribe Irrigation Project and more than 21,000 acres of private irrigation.

In the irrigation districts, there are 38 off-stream reservoirs, with live storage capacity ranging from a few hundred to 260,000 acre-feet. Combined, the live storage capacity of these reservoirs is nearly one million acre-feet.

[6] "Irrigation Development In Alberta – Water Use and Impact on Regional Development – St. Mary River and Southern Tributaries Watersheds", Alberta Agriculture, Food and Rural Development. International Joint Commission Submission.

4.3: The St. Mary Project[6]

Development of the St. Mary Project (SMP) was the earliest implementation of a major irrigation system in southern Alberta. With initial construction in the late 1890's and water delivery to what is known as the (western block) of the St. Mary River Irrigation District (SMRID) in 1900.

Today, the SMP is comprised of four irrigation districts: Magrath, Raymond, St. Mary River and Taber. These districts are served by a 283 km (176 mile) long main carrier canal, which can carry 3,200 cfs at the start of the system to 360 cfs near Medicine Hat. Two hydro power plants located on this canal have a total electricity generating capacity of about 30 megawatts. A seven-megawatt plant was recently commissioned on the canal near the town of Raymond.

Approximately 2,400 km (1,500 miles) of canals and pipelines, plus 18 off-stream reservoirs convey water to more than 2,000 irrigation water users irrigating about 524,000 acres of land, 15 to 20 recreational areas, several rural municipalities, industry and various other uses. The total replacement cost for the SMP infrastructure is estimated at about $923 million.[7]

Currently, SMP district irrigation producers are applying sufficient irrigation water to satisfy 75 to 100 per cent of optimum crop requirements, with an average application of about 84 per cent. This average is expected to increase to about 90 per cent over the next 10 to 15 years.

Irrigation producers in the St. Mary and Taber Irrigation Districts, where approximately 87 per cent of the irrigated land is located, currently use approximately 1.10 acre-ft of water per acre.

Approximately 93,000 acres of specialty crops were grown in this region in 2003, including 30,000 acres of potatoes, 14,000 acres of sugar beets and 33,000 acres of dry beans.

Water is delivered through irrigation district canals and pipelines to more than 15 rural communities with an estimated total population of 20,000. Another 17,000 people have water user or water co-operative agreements with irrigation districts.

5.0: ENSURING SUSTAINABLE SUPPLY

Alberta is committed to the wise and productive use of water and has actively developed its infrastructure across the entire province. In the past 15 years, Alberta has increased storage capacity in the South Saskatchewan River Basin by about 500,000 acre-feet through projects such as the Oldman River Dam, Pine Coulee Reservoir, Clear Lake and Twin Valley Reservoir. Under the framework of Alberta's Water for Life strategy, the province will explore additional opportunities for development of storage as a tool in securing water supplies.

5.1: Rehabilitation and Increasing Efficiency

Rehabilitation of the irrigation infrastructure, combined with improvements to on-farm irrigation systems, have resulted in significant improvements in water use efficiency throughout the irrigated areas of southern Alberta.

The Irrigation Rehabilitation Program, initiated in 1968, has improved over 50 per cent of the more than 7,600 km (4,700 miles) of irrigation district conveyance works. The infrastructure has a 2003 replacement value of $2.5 billion.

To date, the combined rehabilitation contribution of the Government of Alberta and irrigation district water users totals approximately $665 million. The four districts of the St. Mary Project have invested approximately 40 per cent of the total irrigation district contribution.

[7] "Water Management Operations", August 20, 2004

Rehabilitation of provincially-owned water management infrastructure throughout Alberta is currently being funded at about $30 million per year. The recent rehabilitation of the St. Mary Spillway cost more than $40 million.

Infrastructure rehabilitation and improved on-farm irrigation have significantly reduced canal seepage and evaporation from an estimated 15 per cent to about 5 to 7 per cent, and soil salinity from 18 per cent to 1 to 2 per cent. Irrigation return flows have also been reduced from 25 to 35 per cent to about 16 per cent.

Irrigation producers in this region have invested approximately $250 million in irrigation equipment over the past 15 years. This does not include land or water right acquisition costs, or the additional capital investment associated with specialized irrigation farming.

On-farm irrigation efficiency has increased from 36 per cent in 1965 to 74 per cent in 2000. Irrigation producers continue to shift to more efficient, lower energy, low-pressure centre pivot sprinkler systems.

The result of all of these initiatives is that the "duty" of water (the amount, in inches, delivered to a farm) in Alberta is now approximately 14 inches, verses the approximately 30 inches when the Order was issued. As a result, Alberta can irrigate significantly more acres today than it could in 1921 with the same amount of water, even with appreciably greater yields per acre. Increasing the efficiency of water use is equivalent to finding new water. Alberta's water strategy, outlined in the *Water for Life* document has set a conservation goal of increasing water productivityby 30 per cent by the year 2015.

Alberta's experience is that investments in infrastructure yield long-term benefits. The U.S. Bureau of Reclamation identified this issue when Montana experienced irrigation shortfalls in seven of 10 years – "*in six of the seven short years, the shortage is due to inadequate capacity of project canals and laterals (or inadequate infrastructure)*"; not lack of water.[8] In fact, the U.S. Bureau of Reclamation determined that with appropriate infrastructure investment, total water delivered to the farm headgate could be as much as 27.30 inches/acre annually[9] – nearly double the amount currently being used for irrigation in Alberta, without any changes to the Order.

6.0: MONTANA'S 2003 CHALLENGE TO THE 1921 ORDER

6.1: Settled Issue Raised Again

Contrary to Montana's arguments, in the January 2004 response to the IJC, that it is introducing new information, all of the arguments put forward are either a repetition of issues that were presented, debated and considered during the course of the 1915-21 hearings, or issues which are irrelevant to the 1921 Order. The irrelevant issues deal with items that are the consequence of the extent and state of the infrastructure developed and maintained by Alberta and Montana. In other words they are a reflection of the level of investment each country has made towards utilizing their share of the waters as defined by the 1921 Order.

The following provides Alberta's perspective on the four main issues upon which Montana bases its request for a review of the 1921 Order. A more detailed response to the sub-issues included in each of these categories is provided at the end of this section.

[8] Page 32, "Draft, North Central Montana - Alternative Scoping Document" U.S Bureau of Reclamation Montana Area Office, Billings, Montana, March 2003

[9] Page 61, "Draft, North Central Montana -Alternative Scoping Document," U.S. Bureau of Reclamation Montana Area Office, Billings, Montana, March 2003

1. ***The meaning of Article VI of the Treaty. How Article VI should be or should have been interpreted.***

Throughout its 2004 response, Montana acknowledges that it is not introducing any new information or arguments but rather that it is not "fully" satisfied with the final reconstruction, as made evident by the following quotes from Montana's response:

- "*The IJC held numerous and very contentious hearings between 1915 and 1921 on the measurement and apportionment of the waters of the St. Mary and Milk Rivers and their tributaries. Two major issues of disagreement between Canada and the United States rose to the surface and affected the final outcome of the 1921 Order. The IJC appeared to compromise on the two issues, favoring the United States on one and Canada on the other [prior appropriation].*"
- "*...The IJC accepted the Canadian position that the provision of prior appropriation in the second sentence is the dominant factor in the treaty, and not the equal apportionment provision found in the first sentence.*"
- "*Canada argued that the treaty recognizes, but does not apportion, the priority water ...Canada believed that this water is to be subtracted before the remaining water is to be divided equally...the United States disagreed and argued that the priority waters are included in the equal apportionment stated i n the first sentence.* ***The IJC agreed with Canada.***"

Alberta's Perspective:
The language of Article VI was argued extensively at all of the IJC hearings prior to the drafting of the 1921Order. Many of the issues were repeated during the 1928-31 Proceedings. Montana is not introducing any new information or arguments relating to the language of Article VI, and debating issues relating to the language or intent of the first paragraph in Article VI further will not provide any new information or ideas that were not already considered by the Commissioners in their unanimous approval of the 1921 Order.

Based on the above discussion, it is clear that this issue was extensively discussed during the course of the 1915-21 hearings and that, as the 1921 Order was based on consideration of all factors, Montana has not provided adequate justification for a review of the 1921 Order.

2. ***Circumstances are different today than they were in 1921.***

Alberta's Perspective:
Respecting Montana's assertion that our understanding of hydrology has changed, an analysis of the records show that the hydrologic understanding at the time of the 1921 Order still holds. After 100 years of record, the relative numbers have not changed appreciably. The differences between the hydrological numbers calculated leading up to the Order and the numbers calculated today are minor.

Respecting the issue of aboriginal water rights, a review of the 1915-21 hearings prior to the Order made it clear that:

1. The potential implications of the Winters case, on which the United States Supreme Court rendered its decision on January 6, 1908, were fully recognized during the negotiations leading to the Treaty as well as at the time of the hearings, and
2. Negotiators of the Treaty had agreed that each country must meet the water rights of its citizens from its allocations. Alberta has adhered to this requirement, even denying new water rights on the Milk River when it was clear that water supply would not support new demands.

Respecting the issue that Alberta is irrigating more acres than initially envisaged while Montana is unable to irrigate the acreage envisaged at the 1915 hearings, in the years since the Treaty and the Order, Canada and Alberta have carried out public works to use the Canadian share of the water covered by the Order and to increase its irrigation efficiency. These works, plus increased water use efficiencies, have permitted Alberta to expand its irrigation while using the same or a lesser quantity of water and, more importantly, to make these expansions while continuing to fully meet all of its Treaty obligations to Montana. The United States and Montana can make similar investments and improvements in irrigation efficiency.

3. *There are problems with the administrative procedures that implement the Order.*

Montana has stated:
"*The current apportionment procedures underestimate Canada's water usage in the Milk River Basin and the result is that the United States receives less water than it is entitled to. The existing procedures assume Milk River water use by Canada of 5,158 dam³ (4,181 acre-feet) during average and higher flow years, and 3,925 dam³ (3,180 acre-feet) during dry years. However, in its Milk River Basin Preliminary feasibility Study, Draft Report ... Alberta Environment characterizes Canada's annual water use at 8,900 dam³ (7,215 acre feet) during the irrigation season, ... it also implies that 3,138 hectares (8,601 acres) have been licenced for irrigation with Milk River water in Alberta. In contrast, current apportionment procedures assume 1,810 hectares (4,961 acres) of Canadian irrigation with Milk River water. If the accredited officers are underestimating actual water usage in the Milk River basin, which appears to be the case, this means the United States is receiving considerably less of its entitlement under the existing procedures.*"

Alberta's Perspective:
Due to past difficulties in obtaining regular reports of actual consumption from each water user within the basin, the Accredited Officers for Canada and the U.S, in the early 1980's established an average Canadian and U.S. water use for wet, average and dry conditions based on field investigations conducted at that time. These averages have continued to be used into the 1990's even though it is recognized that there has been an increase in water use activities since that time.

In 2002, at the request of Alberta and Montana, the certified Field Officers for both Canada and the U.S. established the "Eastern Tributaries Technical Working Group" (ETTWG) and "Milk River Technical Working Group" for the purpose of reviewing the current apportionment procedures, including Canadian and U.S. water use within the Milk River basin. Both Montana and Alberta are represented on these committees. While water use within the Milk River basin is likely greater today than it was when the currently used averages were established:

- Canada's water use within the Milk River basin is still a small fraction of its entitlements
- Canada continues to pass most of its entitlements to the U.S. such that "the U.S. receives on average about 40,000 acre-feet (54,200 dam³) of Canada's share of the Milk [River].[10]"

It is Alberta's position that, in spite of minor computational problems, Montana continues to receive greater flow than its entitlement in the Milk River and that the Reclamation and Irrigation Officers of the two countries are taking "such further and other steps as may be necessary or advisable in order to insure the apportionment of the said waters in accordance with the directions of the 1921 Order." It is therefore Alberta's position that Montana has not provided sufficient reason to review the 1921.

[10] "North Central Montana – Alternative Scoping Document" U.S. Bureau of Reclamation, Montana Area Office, Billings, Montana; March 2003 (page 33)

4. Proposed projects in both countries warrant a review of the 1921 Order.

The contention that a review now "*is timely as Alberta is considering a storage project on the Milk River in Alberta and Montana is and the U.S. bureau of Reclamation are in the process of rehabilitating the St. Mary facilities and increasing the capacity of the canal back to its original design capacity of 850 cfs*" is irrelevant to the issue.

Alberta's Perspective:
The 1921 Order of the IJC clarified Canadian and U.S. entitlements to the waters of the St. Mary and Milk Rivers. Alberta's investigation into the feasibility of potential storage on the Milk River and the U.S. Bureau of Reclamation's activities towards the rehabilitation of the St. Mary facilities, including increasing the capacity of the U.S. St. Mary Canal back to 850 cubic feet per second, are water management activities directed towards increasing each country's ability to more fully and beneficially use their share of the waters of the these streams. These project investigations depend on the stability of the Order for many of their calculations and assumptions. Whether carried out individually or jointly, they are only possible under conditions in which there is final settlement of each country's entitlements and obligations, as provided by the 1921 Order. These project investigations should serve as an opportunity to examine potential joint ventures that would bring greater benefit to both countries, rather than introducing instabilities that are counterproductive to long-term planning. Any review of the 1921 Order would be counterproductive to the development of the infrastructure required by both countries to more fully and beneficially use the waters of these rivers.

Detailed Discussion Item 1:

The meaning of Article VI of the Treaty: How Article VI should be or should have been interpreted.

Montana's Claim

1a. The Order overlooks the first sentence of the two sentences paragraph of Article VI which states three very important conditions to be followed in apportioning the flows of the St. Mary and Milk Rivers and their tributaries. These are:

- The St. Mary & Milk Rivers and their tributaries are to be treated as one stream for the purpose of irrigation and power
- The waters thereof shall be shared equally between the two countries
- In making such equal apportionment *more than half may be taken from one river and less than half from the other* by either country so as to afford a more beneficial use to each [country].

"The Order does not treat the Milk and St. Mary Rivers as one stream, it does not provide for an equal apportionment, nor does it try to rebalance the flows of the two streams to ensure more equal apportionment." Montana goes on to provide their perception as to the *intent* the drafters of the Treaty had when they entered these words into the first sentence. This being "The drafters of the treaty realized that the St. Mary River produces considerably more water with far more consistent flows than the Milk River. They knew, as did most water users back then, that the Milk River frequently goes dry in the summer and fall. Therefore the drafters wanted the IJC order to have the flexibility to adjust the apportionment of the two rivers to better ensure an equal split of the combined flows."

It continues, "On average the United States receives about 40 per cent of the combined flows of the St. Mary and Milk Rivers and Canada receives about 60 per cent. During drought years, when water is critically needed, the United States generally receives an even smaller amount."

"*Provides for an equal apportionment by allowing more than half of the water to be taken from one river by one country and more than half of the water from the other river to be taken by the other country so as to afford a more beneficial use to each.*" This should mean that the treaty drafters recognized that the St. Mary produces more water with more consistent flows than the Milk, which frequently went dry in the summer and fall. The drafters intended the order to have the flexibility to adjust the apportionment on the two rivers to ensure and equal split of the combined flows.

Alberta's Position

1a. These issues were extensively discussed during the course of the 1909-1921 hearings. The 1921 Order of the IJC was based on a full understanding and consideration of all factors associated with this issue, including a review of all records from the 1915-1921 hearings used in the reconstruction of the Treaty's intent. As such, the rationale advanced for opening the Order does not contain anything that was not previously considered by the IJC, and does not justify a review of the 1921 Order. More specifically;

1. The Treaty apportions equally, between Canada and the U.S., all waters that are above and beyond the prior appropriation to the two countries.
2. All prior appropriations grant "the right to take the water first, under the law of both the Western States and Canadian Provinces, the law of appropriation"[11] and as such the prior appropriations are not subject to equal sharing.

[11] Hon Thomas Walsh, United States Senator from Montana, 1931 (page 20)

Alberta's Position

1a. (continued)

3. Information used to conclude that "on average the U.S. receives 40 per cent of the combined flow does not agree with values published by the Accredited Officers in their 2002 report to the IJC[12]. Based on the Accredited Officers' 2002 report to the IJC, it is estimated that the1950-2002 average annual United States entitlements at the International Boundary, (Table 1, Section 3.0) are about 404,272 acre-feet or about 45.5 per cent of the combined flow of the St. Mary River and Milk River, and their tributaries at the international boundary. This is not a new situation but rather a condition which both the drafters of the Treaty and the Commissioners who issued the 1921 Order were fully aware of as evidenced by comments by Montana Lawyer Mr. W.B. Sands, representing the Water Users Association of the Lower Milk River, at the St Paul hearing in 1915 where he said:

   - "***By the terms of this treaty we give to the Canadians 58 per cent, which ought to be fair, and ought to be all that they could possibly ask.***"[13]

   From Mr. Sand's statement it is clear that the hydrology of the two rivers and the implications of the Treaty were fully understood in 1915. Even with the significantly longer record now available, the Canadian share (54.5 per cent – Table 1) is only slightly lower than the 58 per cent estimated in 1915.

Further, U.S computations[14] indicate that the U.S entitlements when combined with the flow generated in the lower Milk River provide the U.S. with a greater quantity of water than the total available to Canada from these streams.

All issues identified, including differences in the percentage of the water received by the two countries, were fully represented, and extensively discussed during the course of the 1915-1921 hearings. These issues were fully considered by the Commissioners prior to their issuing the 1921Order. This is further supported by the following statements in Montana's letter:

- "Canada [during the 1915-21 hearings] argued that the first 500 cubic feet per second (cfs) or 3/4 of the natural flow, whichever is less, of the St. Mary River belongs to Canada and the first 500 cfs or 3/4 of the natural flow whichever is less of the Milk River system belongs to the United States during the irrigation season. More damaging to the United States is that Canada argued successfully that these waters should not be included in the equal apportionment as stated in the first sentence." "In contrast, the United States argued that all the waters of the two rivers are to be divided equally, and that the prior right that goes to Canada on the St. Mary River and the prior right that goes to the United States on the Milk River should be included in this equal division."
- "The IJC disagreed with the U. S. and accepted the Canadian position as a part of a compromise...In doing so, the IJC concluded that this prior appropriation amount of water should not be a part of the equal division, but that the only waters to be divided equally are those in excess of this prior amount."
- "The United States tried to have the IJC change the 1921 Order in 1931...The IJC declined the United States request." "Canada argued that the treaty recognizes, but does not apportion, the priority water ...Canada

[12] Report to The International Joint Commission On The Division of the Waters of The St. Mary and Milk Rivers – 2002

[13] Page 225, 1915 St. Paul Hearing

[14] "Synthesis of Natural Flows at Selected Sites in and Near The Milk River Basin, Montana, 1928-89", Prepare by Lawrence E. Cary and Charles Parrett, U.S. Geological Survey Water-Resources Investigation Report 95-4022, Helena, Montana: March 1995.

believed that this water is to be subtracted before the remaining water is to be divided equally...the U. S. disagreed and argued that the priority waters are included in the equal apportionment stated in the first sentence. **The IJC agreed with Canada.**"

In fact not all Americans disagreed, The eminent engineer, Mr. F.H Newell, one of the American negotiators of Article VI, made it clear at the 1915 hearing that the negotiators intended that prior appropriations of up to 500 cfs were to be deducted from the flows before equal division of the balance of flows[15].

Montana's Claim

1b. "The IJC held numerous and very contentious hearings between 1915 and 1921 on the measurement and apportionment of the waters of the St. Mary and Milk Rivers and their tributaries. Two major issues of disagreement between Canada and the United States rose to the surface and affected the final outcome of the 1921 Order. The IJC appeared to compromise on the two issues, favoring the United States on one and Canada on the other [prior appropriation]."

Alberta's Position

1b. A review of the 1915-21 Hearings makes it very clear that during the course of the hearings the Commission went to great lengths to ensure that all issues and arguments were presented, extensively discussed and duly considered including all arguments and documents relating to the intent of the Treaty. From the 1915-21 hearings it is apparent that the 1921 Order was based on the intent of the Treaty for each issue rather than any compromise in which one country was favoured on one issue and the other on another issue. The resulting 1921 Order represents the considered opinion of the Commissioners on what Article VI meant and how it should be implemented. The fact that the Commissioners were unanimous in their support of the Order and that each country accepted the Order is evidence they determined the Order conformed to the Treaty.

Montana's Claim

1c. It is unclear why Lee and Rolph Creeks, two international tributaries of the St. Mary River, were excluded from the apportionment procedures. We believe these streams should be included in the apportionment calculations.

"*Canada argued in the early 1900s that these waters were not used to sustain beneficial uses such as irrigation and, therefore, should not be included in apportionment. This is not the case today, because these streams, especially Lee Creek, like the St. Mary River produce sufficient quantities of water and are heavily used for irrigation [in Canada].*"

Alberta's Position

1c. Lee Creek and Rolph Creek were discussed during the course of the 1915-1921 hearings.[16] As indicated at the time, the only water uses within the Lee Creek basin were one seventy-acre irrigation project within Alberta and the municipal water supply for the Town of Cardston while Rolph Creek was considered as "not receiving any water of any consequence in the United States."

Today, there continues to be no identified U.S. beneficial uses within Lee Creek that would cause Canada, the downstream jurisdiction, any concern regarding the water it receives. In fact, Canadian irrigation uses on Lee Creek are still very minor, though greater than in 1915. While the U.S. St. Mary Diversion Canal is currently intercepting a portion of the flow for Rolph Creek, Canada, the downstream jurisdiction, does not have any concerns regarding the quantity of water it receives in Rolph Creek.

[15] Mr. F.H. Newell, Page 15, 1915 Hearing, St. Paul

[16] Pages 110 and 111, 1915 Hearing in St. Paul

Detailed Discussion Item 2:

Today's reality is significantly different than that foreseen in 1921 and the Order should reflect this reality.

Montana's Claim

2a. In 1921 the United States projected that it could irrigate 220,000 acres in the Milk River basin of Montana from the combined St. Mary and Milk River flows. Today, the United States irrigates about 140,000 acres, and these acres receive only 1/2 of a full service supply. Further, Montana's Milk River irrigators experience water shortages in six to seven years of every 10 years. This is because the water supplies in the United States portion of the Milk River basin are limited even with the existing St Mary water.

A number of storage projects were proposed for construction back in the early 1900s, but were never built, especially on the U.S. side of the border. One was the 240,000 acre-foot Chain-of-Lakes storage project on the Milk River main stem. Another was a dam on Lower St. Mary Lake.

Alberta's Position

2a. In his testimony at the IJC hearings of May 25, 1915, Mr. F.H. Newell, Consulting Engineer of the United States Reclamation Service, states "The total cost of the proposed works [distribution canals, diversion canal and storage], of which this diversion is an essential part, is about $8,000,000 to irrigate nearly 220,000 acres." Under cross examination Mr. Newell states: "To supply these canals [distribution canals located in the lower Milk River] with water, in addition to the flood waters of Milk River, we are building in St. Mary River Basin... a storage dam at Sherbourne Lake ... the capacity of which will be 75,000 acre feet. There is contemplated in the future a dam at the outlet of the lower St. Mary Lake which will create a reservoir of about 124,000 acre-feet. ... We propose to utilize the 75,000 acre feet in Sherbourne Lake and probably the 124,000 in St. Mary Lake, making in the future, perhaps within 10 years, practically 200,000 acre feet storage."[17] Under further questioning he also identifies that an 850 second-foot canal was required to divert the U.S. entitlements from these storage reservoirs to the Milk River basin.

Today's water management reality within Montana is different than that envisioned in 1915. The U.S. has never constructed the 124,000 acre-foot storage reservoir on Lower St. Mary Lake, and the diversion canal carrying U.S. entitlements from the St. Mary River to the Milk has deteriorated such that it now has a capacity of only 650 cubic feet per second. As a result, today the U.S. on average is diverting only about 62 per cent of its entitlements of the flow of the St. Mary River (Table 1). The situation in the Lower Milk River is much the same, as a number of reservoirs envisioned in 1915 were never constructed, those that were have much reduced capacity due to sedimentation, and the water distribution system has inadequate capacity to deliver irrigation requirements during most years, thereby resulting in irrigation shortfalls even during years when there is adequate water supplies. In addition, most of Montana's irrigation projects rely on highly inefficient flood irrigation and require approximately 29 inches of water[18] as compared to the average of about 14 inches applied to irrigation projects in southern Alberta.

Montana acknowledges this situation in their response by stating "A number of storage projects were proposed for construction in the early 1900s, but were never built, especially on the U.S. side of the border. One was the 240,000 acre-foot Chain-of-Lakes storage project on

[17] Pages 24-25, IJC Hearing and Argument In The Matter of the Measurement and Apportionment of the Waters of the St. Mary and Milk Rivers and their Tributaries in The United States and Canada, St. Paul, Minnesota., May 24-28, 1915

[18] "North Central Montana – Alternative Scoping Document" U.S. Bureau of Reclamation, Montana Area Office, Billings, Montana: March 2003 (page 61)

the Milk River main stem. Another was a dam on Lower St. Mary Lake. ...This project was never built."

This situation is further acknowledged by the U.S. Bureau of Reclamation in their March 2003 report "NORTH CENTRAL MONTANA-Alternative Scoping Document" which states:

Page 11 – "The average annual flow of the river [St. Mary River] is 650,000 AF, of which the U.S. share is 266,000 AF (40.9 per cent of total)."

Page 42 – "The St. Mary provided an average of about 160,000 AF/year (60.1 per cent of U.S. entitlements from the St. Mary River) to the project over the past 20 years."

Page 32 – "Shortages for Reclamation's contracted irrigation water users occur in seven years of 10, even though most users request far less than a full crop requirement. In six of the seven short years, the shortage is due to inadequate capacity of project canals and laterals."

Page 33 – "The deteriorating St. Mary Canal system and decreasing storage in Milk River reservoirs due to sedimentation are major causes of water shortages in the Milk River basin."

Page 33 – "The key component of the project is the St. Mary canal. The 29-mile long canal has outlived its design life, having been completed in 1915. The St. Mary Siphon in the canal and five large drop structures are in imminent danger of failure. Capacity has diminished from the design capacity of 850 cfs to about 650 cfs today."

Page 33 – "Fresno reservoir, main storage reservoir of the project, was completed in 1939. Original storage capacity was 130,000 AF. A 1999 survey of the reservoir indicated a capacity of 93,000 AF. Loss of storage has affected the ability of the project to store enough water to meet irrigation and MR&I demands..."

Page 34 – "Some of the U.S. share of the St. Mary flows unused into Canada most years, except when the water supply is at its lowest."

Page 33 – "The U.S. receives on average about 40,000 AF of Canada's share of the Milk River. Irrigators and towns in Alberta, Canada, are currently looking at plans to use their share more fully...Construction of a reservoir and the possibility of more irrigated acres in Alberta could increase the water shortages of project irrigators, towns, and other water users in the Milk River basin."

In his article in the Spring, 2004 edition of the "Milk River Watershed News" newsletter, no less dedicated a defender of Montana's interests than U.S. Senator Max Baucus recognizes that the Milk/St. Mary problems on the U.S. side are due to "an old system that has not received the attention it needs and deserves...the system is weak and inefficient...This system must be rehabilitated to ensure regular flows as well as improve volumes of water. The drought [is a] factor, but an inefficient system [is] also to blame."

Montana's reduced irrigation capabilities appear to be directly due to U.S. failure to invest in the infrastructure required to take and utilize their share of the waters of the St. Mary River as defined by the Treaty and clarified by the 1921 Order, and of continuing to operate using highly inefficient water distribution systems and irrigation methods. As such, the U.S. has been relying on unused Canadian entitlements in the Milk River to meet part of its irrigation requirements. Canada's (Alberta's) contemplation of a reservoir on the Milk River, so as to better utilize Canada's share of the waters of the Milk River, could eliminate these surplus deliveries.

Montana statement on page 8 of the supplement to their response, that "the IJC [in their 1921 order] ... should have given the United States almost all the natural flow of the Milk River system at the Eastern Crossing, and the ability to keep the St Mary Canal full during its normal operation season" and their request for a review of the 1921 Order would appear to be an attempt to prevent Canada from utilizing its share of Milk River water so as to continue its reliance on unused Canadian entitlements rather than investing in the development of the infrastructure required to effectively and efficiently manage its entitlements.

Montana's Claim

2b. Canadian water use is considerably greater today than that identified in testimony before the IJC in the 1915-1920 era. Canadian water use in the Milk River Basin is considerably greater [today] than anticipated in 1920 ... Alberta's Milk River Basin Preliminary Feasibility Study, Draft Report dated October 15, 2003, indicates that Canadians irrigate 3,138 hectares (8,601 acres) with Milk River water. The report further suggests that, if a new storage project were built on the Milk River in Alberta, it might provide water for up to an additional 13,500 hectares (37,003 acres) of irrigation. This would further reduce the percentage of water received by the United States and would worsen the already significant water shortages that are occurring on the United State's side of the border.

Alberta's Position

2b. The 1921 Order defined Canadian and U.S. entitlements to the waters of the St. Mary and Milk Rivers. The fact that Canadian water use is considerably greater today than identified in 1920 is merely a reflection that, following the 1921 Order which defined its entitlement, Canada has proceeded to make the capital investments required to more fully, beneficially, and efficiently utilize its share of the waters of these two streams, thus permitting an expansion in irrigated areas.

Following the issuance of the 1921 Order, Canada, on the St. Mary River, proceeded to beneficially utilize her full share of apportioned waters by implementing irrigation developments that, up to that point, had been hampered and held up because of uncertainties as to water supplies. As Canada is the downstream jurisdiction within the St. Mary basin, Canada's level of development and utilization has absolutely no impact on the proportion of the entitlements the U.S. chooses to take from this stream. However in recognition of U.S entitlements on the St. Mary River, Canada's water management and development plans were and continue to be based on Canada's legal entitlements as defined by the 1921 Order, rather than any unused portion of the U.S. entitlements.

Within the Milk River basin, Canada has similarly proceeded to make more beneficial use of its share of the apportioned waters by implementing additional irrigation developments with due consideration to U.S. entitlement. In consideration of its obligations to meet U.S. entitlements, Canada (Alberta) in 1996 placed a moratorium on the issuance of additional water rights from the Milk River even though it was only using a small portion of its entitlements. As a result of Canada's inability to store and utilize its share of the Milk River, "the U.S. receives on average about 40,000 acre-feet of Canada's share of the Milk [River]."[19]

Alberta is currently conducting studies to assess the feasibility of constructing a dam on the Milk River that would enable Canada to continue to make beneficial use of its share of the waters of the Milk River, as defined by the 1921 Order. A vital consideration in the feasibility of this project is ensuring that Canada obligation and U.S. entitlements on the Milk and St. Mary River, as defined by the 1921 Order, are fully respected.

These developments and improvements have had no impact on the U.S. ability to take its share of the St. Mary River nor on Canada's ability to deliver U.S. entitlements on the Milk River. As such, Canada proceeding to more fully and beneficially utilize its share of the waters of the Milk and St. Mary Rivers is not sufficient reason to initiate a review of the 1921 Order.

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[19] "North Central Montana – Alternative Scoping Document" U.S. Bureau of Reclamation, Montana Area Office, Billings, Montana; March 2003 (page 33)

Montana's Claim

2c. A number of storage projects that were considered for construction before 1920 were not built, such as the storage project on the Lower St. Mary Lake. This project was to be built and operated jointly by the United States and Canada and would have provided for a more equal distribution of water.

Alberta's Position

2c. In the past Canada has worked cooperatively with the U.S. in the assessment of both administrative procedures and structural solutions, including storage reservoirs, which would permit both countries to make more beneficial use of theirs entitlements to the waters of the Milk and St. Mary. Some of these areas of cooperation included:

- Assessment of the feasibility of a joint storage reservoir on the Milk River near Milk River in the 1980s.
- Assessment of the feasibility of a joint storage reservoir on the Battle Creek in the 1980s.
- The development of a joint Letter of Intent in the 1990s and its subsequent revision in 2002.

Canada and Alberta will continue to work co-operatively with the U.S. in the investigation of potential administrative and structural solutions that will permit both countries to more fully and beneficially utilize their entitlements of the Milk and St. Mary Rivers. However, endeavours can only be carried out under conditions in which each country fully recognizes their rights and obligations to the waters of these streams, any review of the 1921 Order would be counter productive to such cooperative initiatives.

Montana's Claim

2d. The prior water rights of Native American Tribes in the United States were not known in 1920. Even though the United States Supreme Court created federal reserved water rights for Native Americans in 1908, the court did not define the full extent of these water rights until the 1970s. Native American Tribes residing within these two basins claim large amounts of reserved water dating back to 1855.

- Tribes on four Native American reservations located within the Milk and St. Mary River basins of Montana have prior federal water rights dating back to 1855. To date, the federal reserved water right claims have been settled with the Tribes on the Fort Peck, Rocky Boy's and Fort Belknap Reservations in the Milk River drainage. For example, in the Fort Belknap Compact, the Tribes are entitled to divert and use up to 645 cfs of the natural flow of the Milk River and its tributaries upstream of the reservation with a priority date of October 17, 1855.
- The negotiations of the reserved water right claims of the Blackfeet Tribe for significant amounts of water from the St. Mary and Milk Rivers and their tributaries is ongoing.

We know that Native American Tribes on these reservations are entitled to large amounts of water. With the settlement of these prior water rights, existing Milk River irrigators downstream of the reservations will incur even more water shortages.

Alberta's Position

2d. The rights of First Nations is not a new issue but one that has always existed and an issue which, as with other entitlements that pre-date the treaty, both Canada and the US have to address from their respective entitlements. To expand, prior to the signing of the Treaty, the Fort Belknap reservation had been the subject of litigation (known as the Winters Case), where the entitlement to water of the Belknap Reservation had been decided by the United States Supreme Court. As the United States Supreme Court rendered its decision on January 6, 1908 demonstrates that the U.S. knew of the potential extent of aboriginal water rights, and its potential obligations prior to the signing of the Treaty. Even though the U.S knew these allocations, neither these allocations nor Canadian allocations to the Alberta Railway and Irrigation Company, both of which predate the Treaty - were included as a prior appropriation in the Treaty. Based on the reconstruction of intent carried out during the course of the 1915-21 hearings, it is apparent that the prior appropriations negotiated and included in the treaty were intended to meet specific demands of each country rather than prior allocation in either country. The reconstruction further indicated that the intent was that each country would meet the need of its citizens, be it prior or future allocations, from its negotiated share of the waters of the St. Mary and Milk Rivers. The following quotes are provided as evidence that the rights and potential implications of the Winters case were known, fully recognized and debated in the hearings leading up to the 1921 Order:

- "The Supreme Court of the United States in that case recognized the right of that Indian canal to the full extent claimed, and based the decision upon their riparian rights. Just what will be the result when the matter is finally worked out no one can tell, because if that decree were enforced precisely as it is drawn most of the private ditches that have been in use there for 30 years or thereabouts would lose all their water."[20]
- "The amount of 125 second-feet or more was decreed to the Fort Belknap Indians by the court in the case Winters v, United States (207 U.S.,564)."[21]

The requirement to deal with water needs of the Blackfeet Tribe was also known before the 1921 order was developed as evidenced in the following statement by the Hon. M. Dixon, Governor of Montana, appearing before the Commissioners at the meeting in Chinook on September 15, 1921:

- "It has recently become apparent that irrigation in the United States can begin on the lands of the Blackfeet Indian Reservation almost from the time that the water is taken out of St. Mary River."

In summary, the water rights of First Nations, be they in Canada or the U.S. is not a new issue or circumstance that would justify the reopening of the 1921 Order rather it is a matter of administration of the water that has been allocated. Accordingly, each country should expect to deal with any legal rights of its citizens out of its own entitlements. There are many ways to create the water needed to meet these rights, including improving efficiencies in existing systems, introduction of economic instruments etc.

[20] Statement of Mr. M. Bien, United States Reclamation Service. Page 185, 1915 Hearing, St. Paul.

[21] Correspondence from U.S. Reclamation Service Department of The Interior, Page 206, 1915 Hearing in St. Paul

Detailed Discussion Item 3:

There Are Problems With the Administrative Procedures That Implement the Order, specifically:

Montana's Claim

3a. The apportionment procedures criteria that deficits must be made up, but that no credit is given for the loss of surplus flows, impedes the United States from using its apportioned share.

> "The 1921 order apportions the flows daily and allows either country to make up deficits in the apportionment, but it does not allow credit for surplus waters lost to the other country. What this means for the United States, with its lack of storage in the St. Mary River basin, is that it will continue to lose a considerable amount of its share of water to Canada during the spring freshet and that it will not be able to keep the St. Mary Canal full during the irrigation season, when the flows are below the U.S. apportioned share. Nowhere is it documented that the State of Montana or the U.S. Bureau of Reclamation approved the apportionment procedures or the language associated with making up deficits and not surpluses. This decision has placed the United States at a clear disadvantage."

Alberta's Position

3a. By surplus flows, Montana is referring to the situation in which the upstream country, the U.S. on the St. Mary River and Canada on the Milk River, pass more water than the entitlements of the downstream jurisdiction. This condition generally occurs because the flow exceeds the volume that the upstream jurisdiction is able to take and put to beneficial use at a particular point in time. This situation can arise either due to inadequate storage and canal system required to fully utilize these entitlements during low/normal flow conditions or due to the occurrence of large floods. This issue was discussed and considered during the course of the 1915-21 hearing, though at the time these "surplus flows" were referred to as 'waste water" because they generally occur during large flood events when neither the upstream or downstream country is able to effectively capture and make beneficial use. The concept of a longer apportionment period was put forward at the time by Canada but was rejected by the U.S. on the basis that the intent of the Treaty indicated that apportionment was to be conducted on a daily basis and in part due to concerns that the U.S. would receive its Milk River entitlements in the form of "waste" waters rather than from useful waters during the low flow periods. In this regard, the proposed modification could in effect place an unfair burden on the downstream jurisdiction by requiring it to build oversized infrastructures to effectively capture and manage waste water.

It is noted that while the agreement calls for daily apportionment, the computational procedures that are based on a 15-day computational period have effectively altered the apportionment period to 15 days. It is also noted that modification of this nature, in instances where it can be demonstrated to allow both countries to better utilize their respective share of the waters of these two streams, can be accommodated within the 1921 Order after due consideration by both parties, as demonstrated by the 2001 Letter of Intent.

6.2: Issues Raised At Public Meetings

In July 2004, the IJC held public meetings in Havre and Malta, Montana, Eastend Saskatchewan, and Lethbridge, Alberta, to gather information to assist it in making a decision whether to review the 1921 Order. Alberta attended all of the public meetings and presented information on why the 1921 Order should not be reviewed and identified the positive impacts the 1921 Order has had on the economy and stability of current and future water management investments in the region.

The following section provides detailed information on a number of issues that were raised at the public meetings.

Intent of the Treaty

The language of Article VI was discussed and debated extensively in all of the hearings leading up to the Order. All of the issues raised recently may be found in the transcripts. Both countries entered information about the way Treaties should be read and interpreted, the international water law as it had developed up to then, how Article VI should be read, and they also attempted to reconstruct the intent of the negotiators of the Treaty, respecting Article VI.

The arguments recently advanced, questioning the interpretation of Article VI, are the same points that the Commissioners heard many times during the 1915-21 hearings. There was nothing advanced in Montana's letter, or provided at the public meetings in July, 2004, that is new. Nothing has been provided that shows any error in judgment or understanding of intent by the Commissioners who crafted the Order. The Commissioners had the benefit of the hearings and were able to agree unanimously on the content of the Order. No document or evidence has been provided to show that the six Commissioners, who signed the Order, did not understand the material presented to them by both governments

The fact that all of the Commissioners, Canadian and American, agreed that the Order properly reflected the meaning of Article VI, should require that anyone questioning their considered judgment must provide overwhelmingly persuasive evidence to support their position.

The meaning of fair and equal, and what share each country would receive

During the course of the 1915-21 hearings there was substantial discussion of the meaning of fair and equal. To western Canadians who had already allocated most of the water from these streams, had invested heavily in beneficial use of the rivers, and recognized the law of prior appropriation similar to their western American counterparts, equal share of the waters of these streams did not constitute a fair share of the waters, as it did not respect prior rights. Similarly, to many Americans, who recognized that most of the waters of the St. Mary and Milk Rivers originated in the United States, equal shares were not considered fair.

The Commissioners knew that the two rivers had very different flow characteristics at the boundary, as did the drafters of the Treaty. The Commissioners and the drafters of the Treaty were also fully aware of the sentiments respecting what was considered fair.

The meaning of fair and equal, and the use of the Milk River to convey U.S. diversions.

The Commissioners and the drafters of the Treaty were fully aware that the use of the Canadian portion of the Milk River to convey U.S. St. Mary River diversions across Canada and to Eastern Montana would result in great savings to Montana, while having a number of potentially detrimental impacts on Alberta. In the negotiations leading up to the signing of the Treaty there was discussion of compensating Canada by providing additional water to Canada, for the free passage of the American St Mary River diversions through Alberta.

In summary, the drafters of the Treaty and the Commissioners who issued the 1921 Order were fully aware of all issues respecting fair and equal that have been raised. They also had the benefit of a hydrological record that yielded results that are virtually identical to current numbers. The degree of this understanding is reflected by comments by the Montana lawyer, Mr. W. B Sands, representing the Water Users Association of the Lower Milk River at the St Paul hearing in 1915, who said:

"*By the terms of this treaty we give to the Canadians 58 per cent, which ought to be fair, and ought to be all that they could possibly ask.*"[22]

It is clear from his statement that the hydrology of the two rivers and the implications of the Treaty were fully understood and properly interpreted. Using a significantly longer record, the Canadian share has been slightly lower than the 58 per cent estimated in 1915.

The meaning of prior appropriation and what share each country would receive

Water law in Western Canada and the western United States was developed based on a "first in time, first in right" system of water allocation or appropriation. This meant that the first legal user of water would always have a priority over later users, and each subsequent user would have a lesser right than earlier users, and a senior right to later users. They were entitled to their entire allocation before junior users were entitled to any water.

In Canada, an administrative system was developed so that potential water users had to apply to the government for a right to take water from a stream. The government allocates that right if satisfied that there was sufficient water available to satisfy the right. Each right granted in a particular watershed would receive a lower priority than earlier allocations. Before the water right holder could take the allocated water in any year, he or she had to ensure that enough water passed the point of diversion to meet the full allocation of downstream water right holders with a higher priority.

In the United States, the system was similar, except that individuals wanting to obtain a right to the use of water could take (appropriate) the needed water, and then the priority of this right would be adjudicated in a water court. The water right holders still had to let sufficient water pass the point of diversion to meet the full appropriation of senior water rights downstream.

The meaning and interpretation of prior appropriations were extensively discussed throughout the course of the 1915-1921 hearings. The Canadian interpretation was consistent with the law of "first in time first in right" – that prior appropriation represented a quantity of water that a country was entitled to take so as to meet water allocations issued prior to the Treaty. Equal sharing would apply only to water remaining after each country took its prior appropriation. Based on this interpretation, Canada argued that, since it had allocated nearly all of the flow of the St. Mary River and much of the Milk River prior to 1909, it should be entitled to a greater allocation than was reflected in the Treaty.

The United States' initial position was that the prior appropriation was a right to first access and that once that right is satisfied then the other country has a right to any additional water until such time as the two have received equal amounts, after which any additional waters were to be shared equally between the two countries. However, by the time of the 1920 hearing in Ottawa, the two countries were relying on the reconstruction of the intent of the treaty, as reflected in the following statement by the Honourable George Turner, Counsel for the United States Government, regarding Canada's extensive allocations prior to 1909:

[22] St. Paul hearing, pg. 225

"... the private enterprises initiated in the Dominion of Canada, and the authorization for those enterprises and the amount apportioned to them. That undoubtedly would have been a very moving argument on the part of Canada for a larger portion of these waters than she got, but I can not see that it bears at all upon the question of construction of the treaty as to how much of the water she actually did get."[23]

And by the following statement by Mr. MacInnes, Counsel for the Dominion of Canada, responding to Mr. Turner on a question regarding prior appropriations

"...our side holds an entirely different view, which we think is in the accord with the language and with the intent of the parties, and we think that the matter should be put rather in this way: That there was to be an equal apportionment, if you will, between the two countries; that there was also two prior appropriations, one on one river, one on the other, which might or might not have a different value in the water according to the flow of different rivers. But so far as the two countries were concerned, the prior appropriation which each got on a particular river was the prior appropriation which each wanted. So it got a prior appropriation on its river...the other country got the prior appropriation on the other river, which although perhaps greater in water was not what the other country wanted."

Based on the above discussion and quotes, it is evident that the issue as to the meaning of prior appropriations, what they represent and how they should be treated was presented, extensively discussed and fully considered towards establishing the intent of the Treaty and prior to the 1921 Order. No new material, which was not considered during the 1915-21 hearings, has been presented that would justify a review of the 1921 Order.

Precipitation at Havre, Montana is different today than in 1921

At a public meeting Montana presented precipitation plots for Havre Montana indicating that the period of 1909-1921 was wetter than subsequent years. Montana suggested that this change in precipitation reflects that today's situation is different than in 1921 and therefore the Order does not reflect today's reality and should be reviewed.

An assessment of precipitation data for Havre indicates moderately higher precipitation in the 1909-26 period than in subsequent years, the station was however discontinued in 1960. A review of precipitation trends for Cut Bank, Montana and for several sites in Alberta (including Lethbridge, Medicine Hat, and Cardston) do not indicate any significant change. Similarly, trend analysis for the St. Mary and Milk Rivers do not indicate any significant change. Even if there had been a measurable change in the amount of precipitation, Alberta would be better able to adapt to the changing condition due to its continued investment in improved water management, distribution systems and irrigation practices.

A strong Agreement such as the Treaty and Order provides the stability to enable the parties to make investments required to adapt to any potential future changes in climate.

On average the United States receives about 40 per cent of the flows Canada receives about 60 per cent. During drought years, when water is critically needed, the United States generally receives an even smaller amount.

As indicated in Table 1, Section 3.1 the quantity of water which each country is entitled to can be quite different than the quantity of water that it takes when it is the upstream country on a particular stream and also quite different than the water that it receives when it is the downstream country. As also

[23] Page 196, 1920 Ottawa Hearing

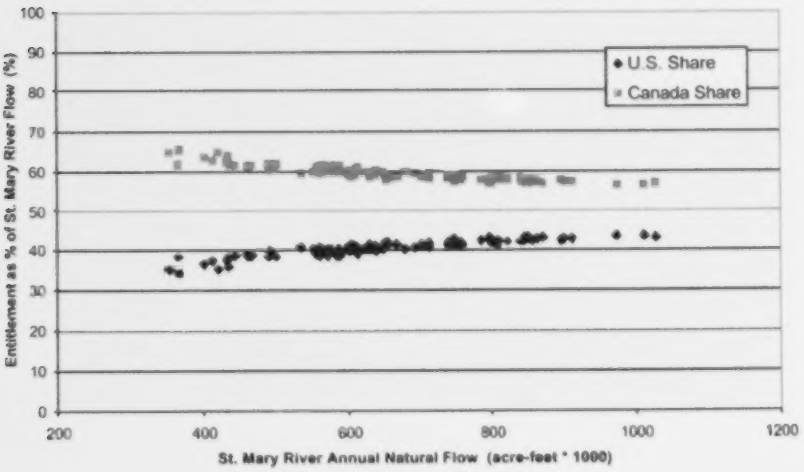
indicated in Table 1, on the St. Mary River the U.S. is entitled to an average annual quantity of about 268,000 acre-feet of water however, the U.S. has only taken an average annual quantity of about 166,000 acre-feet or 62.1 per cent of the water it is entitled to. On the Milk River, The U.S. has been entitled to an average annual quantity of about 77,853 acre-feet however because Canada, the upstream country, has not taken its full share, the U.S. has received an average annual quantity of about 114,721 acre-feet or 147.3 per cent of its entitlement. While the Treaty regulates the maximum amount of water that a country may take when it is the upstream country on a stream and the minimum amount of water that it must receive when it is the downstream country on a stream, the actual amount taken or received by a country will depend on the level of infrastructure development or factors which are controlled by each country rather than the Agreement. In the presentation made at the July 2004 Public Meeting in Havre, Montana, the word "receives" was used synonymously to "is entitled" and will be addressed in that context.

At the July 2004, Public Meeting in Havre, Montana, a graph was presented, which implied that on average the U.S. is entitled to 40 per cent of the flow that this percentage can approach 30 per cent during dry years when water is critically needed. In view of this statement an analysis of IJC published annual entitlements[24] was carried out for the purpose of verifying this statement. The review indicated the following

- Due to prior appropriations from the St Mary River to Canada, U.S. entitlements on the St. Mary River are, on average, in the order of about 41 per cent of total. During dry years U.S. entitlements have been as low as 34 per cent. In wet years U.S. St. Mary entitlements have been as high as 44 per cent (see Figure 2).

Figure 2

U.S. and Canada Entitlements as a Percent of the Natural Flow of the St. Mary River at International Boundary

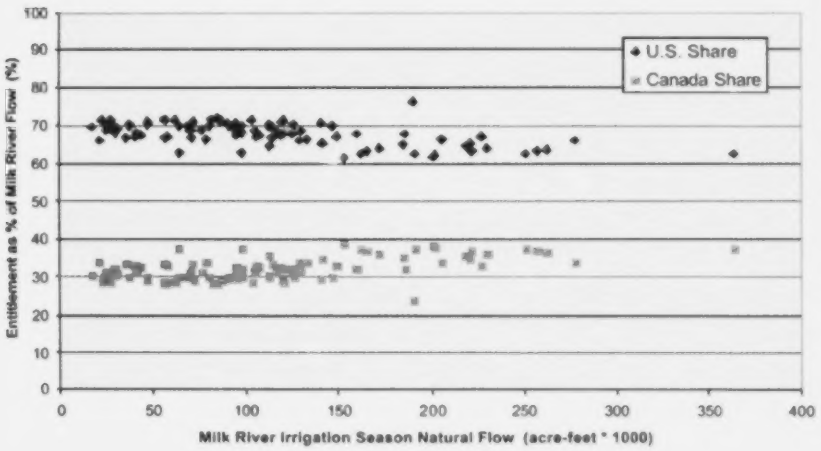


[24] Report to The International Joint Commission On The Division of the Waters of The St. Mary and Milk Rivers 2002

- Due to prior appropriations from the Milk River to the U.S., Canadian entitlements on the Milk River are, on average, in the order of about 33 per cent of total. During dry years Canadian entitlements generally average about 30 per cent, although they have been as low as 25 per cent. In wet years Canadian Milk River entitlements have generally been in the order of 36-38 per cent (Figure 3). The U.S., on average, is entitled to about 67 per cent of the flow of the Milk River.
- In other words, as per the negotiated Treaty, the U.S. received a greater share of one stream, the Milk River, which it considered more important while Canada received a greater share the other stream, the St. Mary River, which it considered important.

Figure 3

U.S. and Canada Entitlements as a Percent of the Natural Flow of the Milk River at International Boundary
(Note: Does not include winter flow)



7.0: ALBERTA'S COMMITMENT TO CONTINUED IMPROVEMENTS IN THE BENEFICIAL USE OF WATER

7.1: Managing Demand

Alberta recognizes that the demand for water will continue to increase. Alberta is working hard to manage water demand by using existing supplies more efficiently, rather than constantly searching for new supplies.

7.1.1: No More Allocations Allowed on the St. Mary or Milk Rivers

All of the water in the St. Mary River that was apportioned to Canada (Alberta), based on the Treaty and the 1921 Order, has been allocated within Alberta. No new water allocations are being granted on the St. Mary River in Alberta. Alberta has introduced water transfers to allow water allocations to be traded as new demands develop.

Most of the runoff for the Milk River occurs prior to the irrigation period in Canada, and Canada has been unable to fully use its entitlement. During the summer of 1986 when water allocations reached 70 per cent of the median volume of Canada's share of the flows of the Milk, Alberta put a moratorium on any further irrigation allocations within the basin. The moratorium, which continues to this day, means that no new water allocations are being granted on the Milk in Alberta. Further, at least two irrigation projects on the Milk River have been cancelled for non-use, with no re-allocation of this water.

Canada and Alberta fully recognize the rights of the U.S. to the waters of the St. Mary and Milk Rivers as allocated under the 1921 Order. Alberta will continue to honour these rights, recognizing that to date the U.S. has been unable to take its full entitlements from the St. Mary River.

7.2: Emphasis on Conservation

Water is a finite resource. The limit of water has been reached in a number of watersheds and is being approached in others. Consequently, the Government of Alberta has created and implemented a provincial water strategy called *Water for Life: Alberta's Strategy for Sustainability.*

Water for Life outlines actions for all Albertans and sectors of the provincial economy to take to ensure a healthy and sustainable water supply for the environment, for communities and for economic well-being.

Alberta is committed to lead in conservation and efficient and effective water use. A key water conservation goal under Alberta's water strategy is to increase the overall efficiency and productivity of all water use by 30 per cent.

8.0: ECONOMIC BENEFITS

Planning and development activities can best be carried out under the stable conditions created by the 1921 Order. Long-term planning and development are necessary to make beneficial use of the waters of these rivers.

Irrigation brings stability to agricultural production and increases land productivity by 300 per cent or more compared to dryland production. Total agricultural benefits resulting from irrigation exceed $5 billion and more than 13,000 full-time jobs. At least 40 per cent of these benefits result from the irrigation development within the St. Mary Project.[25]

Without irrigation development, the regional population would be reduced by an estimated 65 to 75 per cent.

Thirteen per cent or more of the regional gross domestic product, 19 per cent of regional production and 30 per cent of regional employment opportunities in southern Alberta are directly or indirectly associated with irrigated agriculture.

8.1: Other Uses

The irrigation water distribution and management infrastructure supports the water needs of about 42,000 residents in 50 municipalities and 12 major industrial users. At least 40 industries, employing more than 4,000 people use water from southern Alberta's irrigation districts.

Almost 35 per cent of the of the province's gross domestic product in processing industries is directly tied to irrigated production. Agro-processing adds more than 2.66 times the value to farm products in the irrigation areas of southern Alberta, compared to dryland regions of Alberta, based on agro-processing shipments versus farm receipts.

Almost 90 irrigation-supported water bodies in southern Alberta provide recreational activities that include boating, fishing, swimming and water skiing. There are seven provincial parks, 26 municipal parks and 13 day-use recreational areas on or near irrigation reservoirs. Total user-days are about 400,000 each year. Tourists spend about $2 million each year on water-based recreation in southern Alberta. The monetary impact of recreational activities on the regional economy has been estimated at about $29 million each year.

More than 20 irrigation reservoirs provide an estimated 250,000 angler-days of recreational fishing and yield more than 300 tons of commercial fish annually valued at about $500,000.

More than 87,000 acres of wetland habitat have been created or enhanced as a result of irrigation development in southern Alberta.

9.0: WORKING RELATIONSHIPS

9.1: Between Canadian Provinces

Based on the 1921 Order, Alberta has agreements with other Canadian jurisdictions on sharing the waters that rise and/or flow through Alberta. Under the terms of the 1969 Master Agreement on Apportionment, Alberta is required to pass 50 per cent of the flow of streams originating in or entering Alberta on to Saskatchewan, including the South Saskatchewan River, which is supplied by the St. Mary River. Saskatchewan is required to pass 50 per cent of the flow originating in or entering Saskatchewan on to the province of Manitoba.

As a result of the 1909 Boundary Waters Treaty and the 1969 Master Agreement, Alberta is required to pass 75 per cent of the flow of the Lodge and Battle Creek, tributaries of the Milk River to Saskatchewan.

[25] "Irrigation Development In Alberta – Water Use and Impact on Regional Development – St. Mary River and "Southern Tributaries" Watersheds", Alberta Agriculture, Food and Rural Development. International Joint Commission Submission

9.2: Addressing Issues within the Framework of The Order

Past issues have been dealt with fairly and equitably through the processes in place under the Order. There is no reason to believe this cannot continue.

The 2001 Letter of Intent To Better Utilize The Waters of The St. Mary and Milk Rivers and the recently established Eastern Tributaries Working Group and Milk River Working Group (with representation from Montana and Alberta) are excellent examples of how the two countries and area stakeholders have come together to solve problems.

Computational problems in measurement and apportionment are addressed directly through the Accredited Officers within the terms of the Order. As exemplified by the efforts of the Eastern Tributaries Working Group and Milk River Working Group, established by the Field Officers for the purpose of updating the natural flow and apportionment computational procedures and having representation from Montana, Alberta and Saskatchewan, the Order has the flexibility to allow these types of issues to be addressed through cooperative working arrangements, now and in the future.

10.0: CONCLUSIONS

10.1: All of these points have previously been discussed, considered and ruled upon fairly

The Boundary Waters Treaty and the 1921 Order of the International Joint Commission are the framework under which co-operation and mutual understanding between Canada and the United States have flourished since 1909.

The 1921 IJC Order considered all interests, arguments and positions and is a reasonable, fair and balanced solution.

During extensive hearings prior to the 1921 Order, the International Joint Commission heard detailed arguments relating to the meaning of prior appropriation and apportionment as outlined in Article VI from both countries, including the argument that prior appropriations should be included in the equal sharing and arguments as to why they were to be taken prior to equal sharing and why the prior appropriations were not intended to be equal.

The 1921 Order of the IJC was based on full understanding and consideration of all factors and Montana does not raise anything new which was not previously considered by the IJC and which would justify a review of the 1921 Order.

10.2: Certainty is needed for investment and economic growth

Investments in water infrastructure need long-term planning, and the instability that would surround even the possibility of the Order being changed is bad for investment and growth.

Planning and development activities can only be carried out under the conditions of stability provided by the 1921 Order and any review of the 1921 Order would introduce uncertainties relating to entitlements. A review would be counterproductive to the long-term planning and development necessary to make beneficial use of the waters of these rivers.

Based upon the certainty provided by the 1921 Order, Alberta has made significant investments to store, convey and deliver water for farms, industry and power generation, and entered into sharing agreements with other jurisdictions.

As well as making efficient use of existing supplies, Alberta is also working hard to manage demand, through moratoriums on further water allocations from the St. Mary and Milk Rivers and a provincial water strategy that emphasizes conservation across all sectors of the province. With the appropriate infrastructure investments, both Alberta and Montana would be able to more effectively use the water that they are apportioned but are not currently capturing and using. The failure by either country to develop the works necessary to take and effectively and efficiently use their entitlements is not sufficient reason to review the 1921 Order, and it is certainly no reason to burden either country with the uncertainties and disincentive to investment which would result from a review.

10.3: Issues have been – and can continue to be – worked out within the framework of the Order

Alberta believes that the Order has been implemented properly for the past 80 years and water has been apportioned fairly. This is supported by the fact that every year Accredited Officers of the IJC from each country have signed off on the measurement and apportionment and verified that the Order has been implemented appropriately.

Any issues that have arisen have been dealt with fairly and equitably through the processes in place under the Order, and there is no reason to believe that cannot continue.

The 2001 *Letter of Intent To Better Utilize The Waters of The St. Mary and Milk Rivers* and the recently established Eastern Tributaries Working Group and Milk River Working Group, with representation from Montana and Alberta, are excellent examples of how the two countries have come together to solve problems.

Computational problems in measurement and apportionment are addressed directly through the Accredited Officers within the terms of the Order. The Order is flexible enough to allow these types of issues to be addressed through cooperative working arrangements, now and in the future.

10.4: Let's move forward and co-operate on future developments

The Order fosters a spirit of co-operation and mutual understanding. Both countries can build on that to continue to work together. Opening the Order would only misdirect effort that could be more productively used to address future challenges.

Both countries have an interest in more successfully using the waters of these rivers. By directing our energies towards finding solutions to common concerns, we can solve the problems we are both facing.

Contact Information